UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.	)	JUDGE PAUL R. MATIA
	)	CASE NO. 1:97CV2106
Plaintiffs	)	
-vs-	)	MEMORANDUM OF OPINION AND ORDER RE: GRANTING AMERITECH'S MOTION FOR SUMMARY JUDGMENT[1]
AMERITECH SERVICES, INC., et al.	)	
Defendants	)	

The Equal Employment Opportunity Commission ("EEOC" or "Commission") brought this action against Ameritech Services, Inc. ("Ameritech") alleging various discrimination claims. These claims are now before the Court upon cross-motions for summary judgment (ECF Docs. 60 and 76). The Court has reviewed Ameritech's memorandum in support (ECF Doc. 60), the EEOC's memorandum in support and memorandum in opposition (ECF Doc. 76), Ameritech's memorandum in opposition and reply memorandum in support (ECF Doc. 77), and the EEOC's reply memorandum in support (ECF Doc. 80). For the reasons that follow, Ameritech's motion

[1]The within matter came on for a telephonic conference on February 21, 2001, at which time the parties and lead counsel of record agreed that the case could be resolved by a decision on cross-motions for summary judgment. *See* Order (ECF Doc. 51) at 1, No. 1; *see also* ECF Doc. 60 at 10 ("The EEOC and Ameritech agree that there is no genuine issue of material fact.").

for summary judgment will be granted and the EEOC's motion for summary judgment will be denied.

I. FACTS

The EEOC brought this action against Ameritech in August 1997.[2] Ameritech had previously sought a declaratory judgment in the Northern District of Illinois (the "*Foster-Hall*" litigation). Ameritech asked the Illinois district court to issue an order stating that Ameritech's treatment of leaves of absence prior to the effective date of the Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000e(k), did not violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, or other state laws. The defendant class of employees in that action brought counterclaims under Title VII, the EPA, ERISA, and the state laws. *See Ameritech Ben. Plan v. Foster-Hall*,

[2]International Brotherhood of Electrical Workers, Local Nos. 165, 188, 336, 383, and 399, known since September 1, 1998 as Local No. 21 ("IBEW") and Communications Workers of America, AFL-CIO ("CWA") are named as defendants pursuant to Fed. R. Civ. P. 19(a)(2). IBEW and CWA are the bargaining representatives for certain groups of employees of Ameritech. CWA was permitted to realign from party-defendant to party-plaintiff. *See* Order (ECF Doc. 33).

Nos. 97 C 1441 and 97 C 2209.[3] Ameritech previously moved the Court in the case at bar for an order transferring venue to the Northern District of Illinois (ECF Doc. 6), thereby consolidating the Commission's claims with those of the Ameritech employees. The EEOC resisted Ameritech's effort to have the cases consolidated and the motion was subsequently denied. *See* ECF Doc. 41. The Illinois litigation has concluded with a decision favorable to Ameritech, *see Ameritech Ben. Plan Comm. v. Communication Workers of America*, 220 F.3d 814 (7th Cir. 2000), *cert. denied*, 531 U.S. 1127 (2001), and the EEOC now asserts similar claims against Ameritech in this Court.

The following facts are undisputed. *See* Agreed Joint Stipulations of Fact ("Stip.") (ECF Doc. 74). Ameritech Corporation was formed in 1984 when AT&T was ordered to divest itself of the operating company subsidiaries that provided local telephone service. (Stip. ¶¶23-25, 33). The Bell Companies, formerly AT&T subsidiaries, became subsidiaries of Ameritech Corporation and Ameritech Services became operational as a subsidiary of the Bell Companies. (Stip. ¶¶2, 23-25). For purposes of this decision, the difference of corporate identity is

[3]District Judge Suzanne B. Conlon granted Ameritech's motion for summary judgment. *Ameritech Ben. Plan Comm. v. Foster-Hall*, Nos. 97 C 1441 and 97 C 2209, 1998 WL 419483 (N.D. Ill. July 21, 1998).

irrelevant to the outcome. Therefore, Ameritech and its predecessors will be referred to collectively as Ameritech, even though the Court recognizes that Ameritech Services did not come into existence until 1984.

In 1994, Ameritech amended its pension plan, subject to agreement with the Unions. (Stip. ¶¶39, 82-83). This amendment, known as the Ameritech Pension Plan Enhancement Program, provided that eligible employees who terminated employment between February 22, 1994 and September 30, 1995 would have three years of service credit added to their net credited service and three years of age added to their actual ages for purposes of determining retirement benefits and calculating pension benefits. (Stip. ¶¶39-41). With the addition of three years to both service and age, some employees became eligible for immediate service pension and other ancillary benefits otherwise not available. (Stip. ¶41).

This action arises because Ameritech used a record-keeping system it calls Net Credited Service ("NCS") for purposes of determining an employee's entitlement to pension and other employment benefits under the 1994 benefit enhancement program. (Stip. ¶¶34, 35, 39-42). The NCS system produces a number that is assigned to each employee and is used to calculate

seniority. (Stip. ¶¶66, 67). This NCS number reflects continuous employment less deductible absences. (Stip. ¶¶59-65, 70-71).

Before the enactment of the PDA, Ameritech employees who took pregnancy and maternity-related leave were given less seniority credit than employees who took leaves of absence for temporary disabilities. (Stip. ¶34). Furthermore, at certain points prior to August 7, 1977, pregnant Ameritech employees were required to take maternity leave. (Stip. ¶52). As a result, many Ameritech employees who became pregnant prior to 1979 lost substantial amounts of NCS.

On April 29, 1979 (the effective date of the PDA amendments to Title VII), Ameritech amended its maternity leave policy to comply with the new law. (Stip. ¶¶38, 74). Under the amended policy, Ameritech began giving employees full NCS credit for their pregnancy and maternity-related leaves. (Stip. ¶¶38, 74). It did not, however, adjust the NCS periods of employees who had taken pregnancy or maternity-related leaves before the effective date of the PDA amendments. (Stip. ¶40). Despite its refusal to credit affected employees, Ameritech continued to use NCS to determine eligibility for various benefits, including the 1994 benefit enhancement program. (Stip. ¶¶40, 69-71). As a result, an estimated 7,000 Ameritech employees were not eligible for the newly offered benefits. (Stip. ¶10).

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriately granted when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). *See also Meade v. Pension Appeals and Review Comm.*, 966 F.2d 190, 192-93 (6th Cir. 1992).

The moving party is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party must "show that the non-moving party has failed to establish an essential element of his case upon which he would bear the ultimate burden of proof at trial." *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 403 (6th Cir. 1992). In reviewing the motion for summary judgment, the Court must view the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the non-moving party when deciding whether a genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Assn., Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990).

The Supreme Court, in deciding *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), stated that in order for a motion for summary judgment to be granted, there must be no genuine issue of material fact. *Id.* at 248. A fact is "material" only if its resolution will affect the outcome of the lawsuit. In determining whether a factual issue is "genuine" the Court must decide whether the evidence is such that reasonable jurors could find that the non-moving party is entitled to a verdict. *Id.* The existence of a mere scintilla of evidence in support of the non-moving party's position ordinarily will not be sufficient to defeat a motion for summary judgment. *Id.* at 252.

III. THE EEOC IS PROPERLY BEFORE THIS COURT

As an initial matter, it must be decided whether the EEOC is properly before this Court. Ameritech argues that the Seventh Circuit's decision in *Ameritech Ben. Plan Comm. v. Communication Workers of America*, 220 F.3d 814 (7th Cir. 2000), precludes the EEOC from maintaining this action. Given the facts of the *Foster-Hall* litigation and the Sixth Circuit's interpretation of the EEOC's role in bringing employment discrimination claims, the Court finds that the EEOC may seek a decision in this case.

IV. RES JUDICATA AND COLLATERAL ESTOPPEL

Ameritech next contends that the EEOC is barred from maintaining this action based on res judicata and collateral estoppel principles. Under federal res judicata, or claim preclusion, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153 (1979); *see also EEOC v. Frank's Nursery*, 177 F.3d 448, 462 (6th Cir. 1999). While the EEOC appeared before the Seventh Circuit as amicus curiae, that court noted that "[its] ruling . . . will not formally preclude the EEOC in its Ohio action, since the Commission is . . . not a party before this court." *Ameritech*, 220 F.3d at 821. This Court agrees that the EEOC was not a party in the *Foster-Hall* litigation. Ameritech, however, makes the argument that the EEOC was in privity with the *Foster-Hall* defendants. Based on the wider scope of the instant action and the role of the EEOC, this Court disagrees.

Prior proceedings may bind a non-party as a privy where the relationship between the non-party and the party legally entitles the party to stand in judgment for the non-party, or where the non-party's interests were adequately represented by a party with the same interests. *Hansberry v. Lee*, 311 U.S. 32, 41-43 (1940); *Frank's Nursery*, 177 F.3d at 462-63. The

Foster-Hall defendants were not legally entitled to stand in judgment for the EEOC. Furthermore, the interests of the EEOC were not adequately represented in the *Foster-Hall* litigation. The EEOC "does not function simply as a vehicle for conducting litigation on behalf of private parties." *Id.* at 458 (quoting *Occidental Life Ins. v. EEOC*, 432 U.S. 355, 368 (1977)). In fact, "whenever the EEOC sues in its own name, it sues both for the benefit of specific individuals and the public interest." *Id.* This broad public interest, vested in the EEOC, was not adequately represented by the *Foster-Hall* defendants. Therefore, the Court finds that the EEOC is not in privity with the *Foster-Hall* defendants and, as such, claim preclusion does not bar the EEOC from maintaining this action.[4]

Ameritech also argues that issue preclusion, or collateral estoppel, is an additional barrier to the EEOC bringing this action. The Sixth Circuit has stated that "issue preclusion, or collateral estoppel, dictates that once an issue is actually and necessarily determined by a court of competent jurisdiction,

[4]The Court also rejects Ameritech's argument that the Seventh Circuit did not properly decertify the defendant class in the *Foster-Hall* litigation, thereby binding all similarly situated Ameritech employees. The Seventh Circuit noted that the defendant class was never properly certified and, therefore, concluded that it would decide the case only on behalf of the parties properly before it. *Ameritech*, 220 F.3d at 820-21.

that determination is conclusive in subsequent suits based on a different cause of action involving any party to the prior litigation." *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir. 1994). Again, the EEOC was not a party to the *Foster-Hall* litigation and was not in privity with the *Foster-Hall* defendants. Thus, collateral estoppel also does not bar the EEOC from bringing this action.

Ameritech would additionally have the Court find that the EEOC waived its claims when it chose not to intervene in the *Foster-Hall* litigation. Ameritech points out that the EEOC's failure to intervene violated the Commission's internal standards. ECF Doc. 60 at 13. The Sixth Circuit recognized, however, that "the EEOC alone possesses the discretion as to how and when it shall carry out its administrative duties." *Frank's Nursery*, 177 F.3d at 458. Such discretion entitles the EEOC to deviate from its own intervention standards. Therefore, the EEOC is not bound by the *Foster-Hall* litigation.

Another question before this Court is whether the EEOC may seek relief on behalf of the 943 claimants who were named defendants and intervenors in the *Foster-Hall* litigation. The Sixth Circuit in *Frank's Nursery*, *supra*, allowed the EEOC to seek monetary and injunctive relief on behalf of an employee whose claims were slated for arbitration. The Sixth Circuit noted that

the EEOC has broad powers "to obtain monetary remedies for violations of Title VII." *Id.* at 459. This Court need not decide whether those powers are broad enough to seek recovery for parties whose claims have been decided on the merits. *See generally* *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286 (7th Cir. 1993) (holding prior judgment in employee's ADEA action precluded individual relief for him in subsequent EEOC action, but did not preclude injunctive relief against further violation); *EEOC v. U.S. Steel Co.*, 921 F.2d 489 (3d Cir. 1990) (holding that individuals who had fully litigated their own claims under ADEA were precluded from obtaining individual relief in subsequent EEOC action based on same claims). Instead, the EEOC may rely on the claims of the approximately 7,000 similarly situated individuals to seek a decision in this case.

V. CLAIMS ARISING UNDER TITLE VII

The main issue before the Court is whether the EEOC's claims are barred by the statute of limitations. A Title VII charge must be filed within 180 days "after the alleged unlawful employment practice occurred," unless the plaintiff initially filed with an appropriate State or local agency, in which case the charge must be filed within 300 days. 42 U.S.C.

§ 2000e-5(e)(1). The EEOC depends on the filing of charges for notification of possible discrimination. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984); *Frank's Nursery*, 177 F.3d at 456. Therefore, this action hinges on whether such notification was timely. Ameritech argues that the alleged unlawful employment practice occurred when it revised its seniority system in 1979 to comply with the newly enacted PDA. The EEOC, on the other hand, argues that any accumulation of credit in the NCS was discriminatory and that the Commission was timely notified that NCS was used to determine early retirement benefits.

The EEOC is correct in pointing out that the Seventh Circuit's decision in *Ameritech*, *supra*, is not binding on this Court. ECF Doc. 76 at 15 n.13. That decision, however, has a "powerful *stare decisis* effect" on the claims now before this Court. *Ameritech*, 220 F.3d at 821. The Seventh Circuit held, and this Court agrees, that "[this] case involves computation of time in service--seniority by another name--followed by a neutral application of a benefit package to all employees with the same amount of time." *Id.* at 823. It must be determined, therefore, if and when this seniority system (the NCS) violated Title VII.

Seniority of Ameritech's employees is determined under the NCS system. (Stip. ¶¶66-70). Through the NCS, employees are given credit for continuous employment with time for leaves of

absence subtracted. (Stip. ¶¶67-68). Prior to 1979, leaves of absence for pregnant employees were credited differently than leaves of absence for temporarily disabled employees. (Stip. ¶34). All parties agree that if this system were in effect today there would be a clear violation of Title VII. (Stip. ¶¶38, 74); *see also Ameritech*, 220 F.3d at 821 ("Ameritech freely admits that it could not *today* calculate its NCS numbers to favor persons who had not taken pregnancy or maternity leave . . ." (emphasis in original)). Ameritech amended this policy on April 29, 1979, to comply with the PDA amendments to Title VII which became effective that same day. (Stip. ¶¶38, 74). It did not, however, adjust NCS periods of employees who had taken pregnancy or maternity leaves before the effective date of the PDA, nor did it discontinue its use of NCS to calculate various benefits. (Stip. ¶40). Therefore, it must be determined whether Ameritech's use of NCS to calculate early retirement benefits is a new discriminatory act or merely the present effects of pre-PDA discrimination.

When dealing with the aftermath of discriminatory acts which occurred before such acts clearly became illegal, the Supreme Court draws a slight distinction between continuing violations and past violations with present effects. *Compare Bazemore v. Friday*, 478 U.S. 385 (1986) with *United Air Lines v. Evans*, 431 U.S. 553 (1977). This distinction becomes important in

the instant case because if the continuing violation doctrine applies, the EEOC's claims are timely. On the other hand, if limited eligibility for Ameritech's early retirement benefit offer is the present effect of its pre-1979 maternity leave policy, Ameritech is entitled to judgment as a matter of law.

The Supreme Court considered the present effects of past discrimination in *Evans*, *supra*. The defendant airline rehired the plaintiff after its policy of terminating flight attendants upon marriage was found to violate Title VII. The Court held that no present violation existed when the airline refused to credit plaintiff with seniority lost as a result of her termination. *Id.* at 557-58. The Court further stated that plaintiff's claim challenging her termination, as opposed to her claim challenging the airline's refusal to grant seniority credit, was not timely. Therefore, the discriminatory termination was to be treated as an act occurring before Title VII was enacted. *Id.* at 558.

In *Bazemore*, *supra*, the Supreme Court recognized the existence of a continuing violation, which gave rise to a timely Title VII action. The continuing violation occurred when the defendant employer calculated base salary using a discriminatory salary structure. *Id.* at 395-396. The Court held that the use of the discriminatory salary structure violated Title

VII even though this structure was established prior to Title VII's effective date. *Id.* The Court recognized that each paycheck that "delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* Thus, the *Bazemore* plaintiffs were able to file a claim up to 180 days after receiving a paycheck, rather than 180 days after the salary structure was enacted. The EEOC similarly argues that the aggrieved Ameritech employees could file their claims up to 180 days after they were denied eligibility for the newly offered benefits.

Interestingly enough, the *Bazemore* Court discussed and distinguished its *Evans* holding. In footnote six, the Court stated that "[o]ur holding [in *Bazemore*] in no sense gives legal effect to the pre-1972 actions, but, consistent with *Evans* and *Hazelwood [School District v. United States*, 433 U.S. 299 (1977)], focuses on the present salary structure, which is illegal if it is a mere continuance of the pre-1965 discriminatory pay structure." *Id.* at 396 n.6. The critical question is whether any present violation exists, and "[b]ecause the employer was not engaged in discriminatory practices at the time the respondent in *Evans* brought suit, there simply was no violation of Title VII." *Id.* The Sixth Circuit has recognized that the continuing violation

doctrine is a narrow exception to the 180-day statute of limitations. *Cox v. City of Memphis*, 230 F.3d 199 (6th Cir. 2000). When bringing a Title VII claim "the limitations period begins to run in response to discriminatory acts themselves, rather than in response to the continuing effects of past discriminatory acts." *Id.* at 202. In the instant action, therefore, the focus is on whether Ameritech is engaged in any present discriminatory practices.

In 1994, Ameritech decided to offer early retirement and various cash benefits to employees who had high enough NCS numbers to retire between February 22, 1994 and September 30, 1995. The EEOC argues that because use of NCS to calculate benefits favors those who were not pregnant before 1979, Ameritech is engaged in a present discriminatory practice. ECF Doc. 76 at 31-32. The Court is not persuaded by this argument. Ameritech's present NCS structure does not violate Title VII. (*See* Stip. ¶74). If Ameritech had merely continued its pre-PDA maternity leave structure, a continued violation would have occurred pursuant to *Bazemore*, *supra*. Instead, Ameritech amended its policies to fully comply with the PDA amendments.

Furthermore, while the EEOC makes the point that unlike the seniority system in *Evans*, Ameritech's "seniority system differentiates between similarly situated males and females

on the basis of sex," *Evans*, 431 U.S. at 558, this argument comes too late. The proper time for this claim was, at the latest, 300 days after Ameritech's predecessors amended the maternity leave policies to comply with the PDA amendments and subsequently refused to credit those who took maternity leave prior to 1979. *See* 42 U.S.C. § 2000e-5(e)(1).

The EEOC is well aware of the statute of limitations and, therefore, takes a different route. It argues that the newly offered benefits are facially discriminatory because many employees are not eligible due to pre-1979 maternity leave. Ameritech, however, was entitled to rely on NCS in deciding who was eligible for the newly offered benefits for the reasons previously stated. First, the NCS system is presently in full compliance with Title VII; secondly, the NCS system had not been timely challenged. Moreover, the Sixth Circuit recognized that a rule allowing employees to sit on their rights would contradict important policy considerations. *Cox*, 230 F.3d at 205. In *Cox*, the Court held that the City of Memphis was entitled to rely on a tainted promotion list that was not timely challenged. *Id.* at 204-06. To allow city employees to challenge the promotion list the entire time it was used would have created an open-ended period of liability for the employer. *Id.* at 205 (citing *Abrams v. Baylor College of Medicine*, 805 F.2d 528, 534 (5th Cir. 1986)).

The proper time to challenge the tainted list, the Court reasoned, was when the list was promulgated. *Id.* at 204.

The same policy considerations weigh in favor of allowing Ameritech to rely on NCS in determining benefits. As the Seventh Circuit recognized in the prior litigation, "[i]t is no secret to any employee that seniority rolls like Ameritech's NCS make a difference for a host of employee benefits, some present, and some future." *Ameritech*, 220 F.3d at 823. In addition, the affected Ameritech employees knew their NCS had not been credited soon after Ameritech amended its plan in response to the enactment of the PDA. "The time for bringing a complaint was therefore long ago." *Id.*

The Court recognizes that the Ninth Circuit in *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992), reached a different conclusion under similar facts. In the prior litigation, the Illinois district court declined to follow *Pallas*. It stated that "[t]o the extent *Pallas* concludes that reliance on net credited service dates without re-calculating pre-1979 net credited service based on post-1979 law is a facially discriminatory policy, this court finds *Pallas* unpersuasive and respectfully declines to follow it." *Foster-Hall*, 1998 WL 419483, at *5. In addition to recognizing the *stare decisis* effect of the Illinois litigation, this Court

similarly finds *Pallas* unpersuasive and, therefore, declines to follow it. *Contra EEOC v. Bell Atlantic Corp.*, 1999 WL 386725, *4 (S.D.N.Y. June 11, 1999).

The EEOC makes a final argument that 42 U.S.C. § 2000e-5(e)(2) provides a window through which to bring the instant case. Section 2000e-5(e)(2) states in full:

> For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an *intentionally discriminatory purpose* in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or *when a person aggrieved is injured by the application of the seniority system or provision of the system*. (Emphasis added.)

If the EEOC is able to show intentional discrimination, the action challenging NCS accrues at the time Ameritech employees are injured by the seniority system, *i.e.*, when those not eligible as a result of pre-1979 maternity leave were denied the newly offered benefits. *Ameritech*, 220 F.3d at 823. Like the employees in the *Foster-Hall* litigation, the EEOC is unable to prove intentional discrimination.

As the Seventh Circuit pointed out, Ameritech had no reason to consider its maternity leave policy discriminatory, especially after the Supreme Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which held that Title VII did not prohibit distinctions based on pregnancy. *Ameritech*, 220 F.3d at 823. Moreover, in light of the fact that the PDA has not been treated as a retroactive statute, Ameritech had no reason to think it was required to issue seniority credit to those aggrieved by the pre-1979 maternity leave policy. *Id.*; *see also Fields v. Bolger*, 723 F.2d 1216, 1218 n.4 (6th Cir. 1984) (recognizing that "[the PDA] amendment was intended to be prospective only in application"). As such, the EEOC cannot prove that Ameritech adopted the NCS with an intent to discriminate, which renders section 2000e-5(e)(2) inapplicable.

Ameritech offers an additional defense to the EEOC's Title VII claims. It argues that even if the policies at issue are discriminatory, such policies constitute a "*bona fide* seniority system" not actionable under Title VII. Section 2000e-2(h) specifically exempts discriminatory effects that flow from a *bona fide* seniority system from the definition of unlawful employment practices, as long as the differences are not the result of an intention to discriminate. The EEOC counters this argument by pointing out that the PDA amendments to Title VII

prohibit discrimination based on pregnancy and the statute specifically states that "nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise." 42 U.S.C. § 2000e(k). Whether this language eliminates the *bona fide* seniority system safe harbor provision in pregnancy discrimination actions is deftly debated by the parties.

The Court finds that Ameritech has established that the NCS is a *bona fide* seniority system. Since 1979, the NCS has been applied in a neutral manner. Moreover, any disparity represents the present effect of past discrimination. The question remains whether this *bona fide* seniority system is subject to scrutiny in pregnancy discrimination actions. The Court, however, decides this case on other grounds and declines to decide whether the language in 42 U.S.C. § 2000e(k) precludes the use of 42 U.S.C. § 2000e-2(h) in pregnancy discrimination actions. Despite the possible elimination of this safe harbor provision in pregnancy discrimination actions, Ameritech's *bona fide* seniority system does become important when analyzing the claims brought under the Equal Pay Act.

VI. CLAIMS ARISING UNDER THE EQUAL PAY ACT

The EEOC argues that Ameritech's application of NCS to determine eligibility for the 1994 early retirement benefits

violates the EPA. The EPA prohibits employers from discriminating "between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex. . . ." 29 U.S.C. § 206(d)(1). Even assuming the EEOC could establish a *prima facie* case under the EPA, the statute provides Ameritech a complete defense. The EPA provides that there is no violation if the unequal pay was due to "any other factor other than sex," including "(i) a seniority system; (ii) a merit system; [or] (iii) a system which measures earnings by quantity or quality of production." *Id.* This is an affirmative defense for the employer. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974). Again, Ameritech has established that the NCS is a *bona fide* seniority system. While this may not provide a defense in pregnancy discrimination actions, the fact that NCS is a *bona fide* seniority system does provide a complete defense to claims brought under the EPA. *See Ameritech*, 220 F.3d at 824; *EEOC v. J.C. Penny Co., Inc.*, 843 F.2d 249, 253 (6th Cir. 1988) (factors adopted by a company for legitimate business reasons bar claims brought under 29 U.S.C. § 206(d)(1)).

Furthermore, the EEOC's claims brought under the EPA are untimely. The EEOC argues that it does not challenge the pre-1979 denial of service credit as the discriminatory act in

this case, but, instead, asserts that the EPA violation occurred in 1994. ECF Doc. 80 at 29. However, given the fact that 29 U.S.C. § 206(d)(1) precludes the EEOC from bringing an EPA claim against Ameritech for its 1994 reliance on NCS, the only actionable claim occurred more than two years ago. As the Seventh Circuit noted, "[c]laims arising under [the EPA] must be filed within two years of their accrual, 29 U.S.C. § 255(a), and these claims were not presented until many years after the initial decision not to adjust the employees' time in service for pre-1979 pregnancy leaves." *Ameritech*, 220 F.3d at 824.

VII. CONCLUSION

For the foregoing reasons, Ameritech's motion for summary judgment (ECF Doc. 60) is GRANTED and the EEOC's motion for summary judgment (ECF Doc. 76) is DENIED upon the grounds that there is no genuine issue as to any material fact and Ameritech is entitled to a judgment as a matter of law on the merits of the complaint. Final judgment will be entered in favor of Ameritech.

IT IS SO ORDERED.

/s/ PAUL R. MATIA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum of Opinion and Order was filed electronically this 18th day of February, 2004. Notice of this filing will be sent to C. Larry Watson, Regional Attorney, John D. Sargent, Supervisory Trial Attorney, Solvita A. McMillan, Trial Attorney, Joyce Goldstein, Esq., Brian P. O'Connor, Esq., and Cynthia C. Schafer, Esq., by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. A copy of this Order has also been sent by regular mail this 18th day of February, 2004 to Mary K. O'Melveny, Esq., 501 3rd Street, N.W., Suite 800, Washington, D.C. 20001-2797; James D. Holzhauer, Esq., Robert A. Bloom, Esq., and Kim A. Leffert, Esq., Mayer, Brown, Rowe & Maw LLP, 190 South LaSalle Street, Chicago, Illinois 60603; and Gilbert A. Cornfield, Esq., Cornfield and Feldman, 25 East Washington Street, Suite 1400, Chicago, Illinois 60604-1803.

/s/ PAUL R. MATIA

CHIEF JUDGE
UNITED STATES DISTRICT COURT